

# When Posting on Social Media Becomes Attorney Advertising: Avoiding Ethical Pitfalls on Social Media

In this article, we discuss how the Rules of Professional Conduct governing lawyer advertising apply when lawyers post content on social media. We focus in particular on lawyers' LinkedIn profiles as one of the most used channels of social media among lawyers. However, the issues discussed here apply to all platforms.

Since social media became widely accessible, lawyers have been taking advantage of the fact that it can provide new ways to advertise for little or no cost. Recognizing this, the American Bar Association and many state bar associations either revised the regulations and standards of professional conduct or issued opinions to address the special implications of social media, and some bar associations are recognizing the need to consider the permissible limits of what a lawyer may post within the bounds of the ethics rules.

The rules triggered by social media use are the same as the rules that govern attorney advertising generally. *See generally* Model Rules 7.1 (forbidding false or misleading communication about an attorney's services); Model Rule 7.2 (defining permissible attorney advertising); Model Rule 7.3 (explaining when advertising defined in Rule 7.2 constitutes solicitation).

In 2015, two New York ethics opinions provided dueling guidance on when posting information on LinkedIn becomes attorney advertising. In Ethics Opinion 748 (2015), the New York County Lawyers Association concluded "a LinkedIn profile that includes subjective statements regarding an attorney's skills, areas of practice, endorsements, or testimonials from clients or colleagues is likely to be considered advertising," and should contain the disclaimers set forth in Rule 7.1. Under this bright line standard, most attorney LinkedIn pages

would be considered advertisements subject to the Rules. However, the opinion suggests that categorizing objectively verifiable information using the LinkedIn headings "Skills" or "Endorsements" does not constitute a claim to be a "Specialist", which is a prohibited designation under Rule 7.4.

Later in 2015, the New York City Bar Association issued an opinion with a different perspective. NYCBA Formal Opinion 2015-7 (2015) states that, given the numerous reasons that lawyers use LinkedIn, it should not be presumed that attorneys who post information about themselves on LinkedIn necessarily do so for the primary purpose of attracting paying clients. Specifically, the question turns on whether the primary purpose of a lawyer's LinkedIn page is to attract potential clients, rather than, among other things, professional or social networking. Accordingly, a LinkedIn profile will constitute attorney advertising only if the "subjective intent of the lawyer who makes the communication" is retention for pecuniary gain. *See also* N.Y. State Bar Ass'n Comm. Prof'l Ethics, Formal Op. 967 (2013) (concluding that blogging or posting about the law is educational and primary purpose of posting information is not to encourage retaining the lawyer); NY Eth. Op. 1110 (Nov. 23, 2016) (same).

In connection with LinkedIn entries that identify "Skills" or include "Endorsements," several states have issued opinions finding that these entries are subject to the rules and therefore must be accurate. *See generally* The Florida Bar, *The Florida Bar Standing Committee on Advertising Guidelines for Networking Sites* (Aug. 19, 2020) ("If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page."); PA Eth. Op. 2014-300

(“Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney’s social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements. This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party.”); SC Adv. Op. 09-10 (“A lawyer may invite peers to rate the lawyer and may invite and allow the posting of peer and client comments, but all such comments are governed by the Rules of Professional Conduct, and the lawyer is responsible for their content.”).

California shares an approach similar to New York’s with respect to attorney blogging on social media. See Cal. State Bar Comm. Prof’l Responsibility & Conduct, Formal Op. 2012-186 (2012) (concluding attorney may post information about her practice on social media website, but those postings may be subject to compliance if their content can be considered to be “concerning the availability for professional employment”).

In November 2016, the DC Bar Legal Ethics Committee issued Ethics Opinions 370 and 371, which address the permissible use of social media by lawyers. D.C. Ethics Op. 370 notes that attorneys may connect with clients, former clients or other lawyers through social media, but the opinion advises that they

need to do so with caution and heed the following guidance:

- (i) Write about their own cases on social media sites or blogs only with their clients’ informed consent;
- (ii) Identify “specialties,” “skills” and “expertise” on social media, provided that the representations are not false or misleading; and
- (iii) Review their social media presence for accuracy.

In many ways, using social media is similar to any other type of advertising. Social media provides lawyers a forum to communicate with friends, family, and colleagues. However, if lawyers are not careful, social media use can implicate the ethical rules, and lawyers need to be aware that their posts on those sites can reach far beyond their circle of friends or family. Before posting material on social media, lawyers need to consider the issues raised in this article, research the applicable jurisdiction’s rules and ethics opinions regarding advertising, actively take control of their social media presence, and periodically review the endorsements or recommendations appearing on LinkedIn. Firms that have lawyers with LinkedIn accounts and firms that have LinkedIn accounts do well to assign someone to monitor the LinkedIn pages and posts to ensure that the lawyers and the firm remain in compliance with the applicable rules of professional conduct.<sup>1</sup>

1. We recently learned that one firm has a LinkedIn template for lawyers’ profile pages and the marketing people at that firm monitor them to confirm uniformity across all pages. Additionally, lawyers there have a duty to monitor their own accounts for recommendations and to remove them to ensure they are not violating the applicable rules on advertising. Lastly, the firm maintains a policy that lawyers of the firm cannot offer recommendations to others on LinkedIn.

## Further information

If you would like further information on any issue raised in this update please contact:



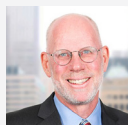
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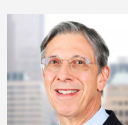
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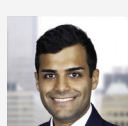
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